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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 371

CITY OF NEWARK, A MUNICIPAL CORPORATION OF NEW JERSEY,

Appellant,

vs.

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY; CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE, AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above named appellant presents this, its statement particularly disclosing the basis upon which appellant contends that the Court has jurisdiction upon appeal to review the judgment appealed from herein.

I. Nature of Case

The case involves the power of the state to authorize a public corporation to construct a public turnpike, in mode

and manner substantially according to its discretion, and without providing specific standards therefor, and without providing in the enabling legislation opportunity for hearing or review.[1] The questions presented, as is shown more fully hereinafter, involve both a construction of this legislation and the operative effect thereof under the facts hereinafter set forth. There is also involved the failure of the state courts to allow a formal trial, with a presentation of evidence, in open court, of the issues involved. The question as to the delegation of powers by the State Legislature to an independent public corporation, NEW JERSEY TURNPIKE AUTHORITY, without adequate standards, is violative of the provisions of the Constitution of the United States quoted below.[2] The failure to provide for a hearing or review in the statute aforesaid, and the granting of a summary judgment against the appellant, with its resultant denial of a proper and adequate forum for an adjudication of its rights, is violative of the provisions of the Constitution of the United States quoted below.[3]

The appellant filed its complaint in the Superior Court of the State of New Jersey, seeking additional review of the conduct and procedure of the defendant, NEW JERSEY TURNPIKE AUTHORITY, an independent public corporation, and praying to enjoin it from proceeding with its contemplated construction of a planned express toll turnpike through the city of Newark. Defendant filed its answer, and then served

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[1] (Revised Statutes of New Jersey 1937—Sections 27:23-1 *et seq.*)

[2] "The United States shall guarantee to every State in this Union a Republican Form of Government, * * *" (Art. IV, Sec. 4).

[3] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment 14, Sec. 1).

notice of summary judgment which, after the submission of affidavits by all parties, argument, and briefs, same was granted against the appellant. The Supreme Court of New Jersey upheld this summary judgment, and upheld the statute as applied to the facts set forth in the complaint and appellant's affidavits. Its opinion is hereto appended. (App. "A," pp. 15-23.) The appellant claims that the statute as so applied, coupled with the entry of a summary judgment, violates the aforesaid provisions of the Federal Constitution.

II. Statutory Provision Sustaining the Jurisdiction

The statutory provision which sustains the jurisdiction of this Court to review on appeal the judgment appealed from herein is Title 28, United States Code, Section 1257(a).

III. State Statute, the Validity of Which Is Involved

The state statute, the validity of which is questioned, is P. L. 1948, c. 454, § 1 *et seq.*, amended P. L. 1940, c. 1; being Sections 27:23-1 *et seq.* of the Revised Statutes of New Jersey 1937. The statute as so amended, constitutes Title 27, Chapter 23, Section 1 *et seq.*, of the Revised Statutes, Cumulative supplement, of New Jersey, contained in the Laws of 1950 and 1951, and is found on pages 39-54 of said supplement.

We do not set forth the statute at length because it is totally devoid of any provision for a review or a hearing.

The only section that describes the type of project is as follows:

> "27:23-1. Turnpike projects.
>
> In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known

safety device including center divisions, ample shoulder widths, longsight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads, the New Jersey Turnpike Authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinafter defined) at such locations as shall be established by law, and to issue turnpike revenue bonds of the Authority, payable solely from tolls, other revenues, and proceeds of such bonds to finance such projects. L. 1948, c. 454, p. 1856, § 1, as amended L. 1950, c. 1, p. , § 2."

IV. Dates of Judgment and Application for Appeal

The judgment of the Supreme Court of New Jersey which is sought to be reviewed herein was rendered on June 18, 1951. The petition for allowance of an appeal to this Court is presented to the Honorable Harold H. Burton, Associate Justice of this Court, on September 17, 1951.

V. Summary of Facts and Rules

The complaint filed by the appellant in the Superior Court of New Jersey and its supporting affidavits in reply to the motion for summary judgment was most comprehensive, detailed and specific in showing that the construction of the toll road through Newark in the manner proposed and now actually in progress is arbitrary, unreasonable and will cause great and unnecessary destruction of property and property rights, unreasonably destroy tax ratables, and unreasonably interfere with the future usability and development of property belonging both to the City of Newark in its proprietary character and to its citizens.

The allegations in the complaint and the detailed assertions in the affidavits were made by reputable, competent and disinterested persons, whose good faith was specifically recognized in the opinion of the court below; and among the many points urged were the following:

1. The unnecessary waste of about 50 acres of land due to the unconfined dirt fill type of construction in place of the more reasonable confined dirt fill or structurally supported type, thereby destroying forever tax ratables to the City and burdening its citizens with a perpetually increased taxation.

2. The unnecessary waste of about 50 acres of land, with the same consequences to the City and to its taxpayers, due to the erection of a second and superfluous interchange at Raymond Boulevard, when the same might more reasonably and more economically be erected a short distance away in the comparatively worthless land of the meadows, thereby avoiding this waste of the City's scant remaining amount of valuable industrial land.

3. The impassability of the construction proposed where it runs through a large, undeveloped industrial area of the City, thereby completely dividing it, damaging a large area of surrounding land, and forever reducing its value to the City as tax ratables, and forever preventing the City from realizing an already planned development in the economic interest and general welfare of the City.

4. The arbitrary lowering of the level of the toll road to five feet, dictated solely by considerations of reducing construction costs, giving the road a roller coaster character, and making it impossible to construct future City streets under the toll road, but requiring that such streets be carried over the toll road by "skyways," which is utterly impracticable and prohibitive in cost.

5. The insignificant amount of additional cost entailed by a proper construction as compared with the arbitrary and unreasonable construction determined upon by the Authority.

6. The fact that the Turnpike Authority has arbitrarily rejected all protests and suggestions of the City for a more

reasonable construction, and has determined its course solely upon considerations of profit to itself and its bondholders, with complete disregard to the interests and property rights of the City and of its inhabitants.

7. The fact that the Turnpike Authority, while refusing to build the road on a viaduct as requested by the City, has changed its original plan and built a long stretch of the road on a similar viaduct to accommodate the railroads in the area.

8. The arbitrary determination as to the width and number of traffic lanes, excessive size of the parkway in the center of the highway, and of the shoulders on either side of the highway, results in a road of an unreasonable width, unnecessary by any reasonable standards of safety, and grossly extravagant and irreparably harmful to the area of the City of Newark involved in this controversy.

9. The delegation of the power of eminent domain is limited to such land as is "reasonable necessary," in law and in fact, to the purposes of the Authority, and the complaint and affidavits raise the question of whether the proposed taking of the City's streets and other properties is "reasonably necessary," presenting issues of fact and law on which the City is entitled as of right to a full and formal trial.

10. The turnpike Authority arbitrarily refused to consider the City's contention that any increased cost of construction would not in fact entail any additional cost to the Authority or its bondholders, but would merely necessitate the maintenance of the tolls on the road for a short time longer.

11. The method and manner of constructing the turnpike in the City of Newark is so unreasonable as to render the "Turnpike Authority Act" unconstitutional in its operation, a mixed question of law and fact as to which the City was entitled to its day in Court.

12. The methods adopted by the Authority in issuing bonds with their allegedly improper limitation as to amount and unreasonably high cost, without publicly revealing the underlying contracts and negotiations, may constitute such an abuse of power as to render its conduct unlawful or the Act, in its operation, unconstitutional.

13. The arbitrary and unreasonable methods adopted by the Turnpike Authority in this project practically confiscates 66 acres of potentially very valuable land zoned for industrial development.

Notwithstanding recognition by the Court below of the good faith of the City's affidavits, the tremendous amount of damages threatened to the City and its inhabitants, running into many millions of dollars, the fact that the specific facts and allegations of the City's affidavits were not disproved, but only generally denied by the Authority's answering affidavits, and in some cases not even denied, the Court below refused to permit the City's suit to go to trial for the purpose of proving these facts and summarily dismissed it on the defendant's motion.

On appeal by the City of Newark, the Supreme Court of the State of New Jersey upheld the lower court's judgment. The Supreme Court's opinion (App. "A", pp. 18-19) includes the following sentences which summarize the Court's holding on the portion of the case therein indicated:

> "In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co.* v. *State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway construction is absolute. Such a holding would give to the Authority a freedom even greater than that of its creator, for the Legislature

itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold* v. *Harper*, 6 N. J. 182 (Sup. Ct. 1951).

Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best method of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment."

Since the statute itself fails to provide for a hearing, the effect of the Court's granting of a summary judgment deprives appellant of any effective forum in which it could develop its testimony in open and established fashion to lay the foundation for a legal adjudication of whether "the Authority's plans were so far from right as to be a manifest abuse of discretion."

The conclusions stated in the opinion of the Supreme Court of New Jersey are contrary to those held by this Court as is shown below.

VI. The Federal Question Involved Is Substantial

In sustaining the statute, although it does not provide adequate standards and does not provide a mode of review,

the Supreme Court of New Jersey, by a summary judgment and without affording appellant a trial "in the ordinary mode", decided an important Federal question in a manner which conflicts with applicable decisions of this Court holding generally that a fundamental requisite of due process of law is the opportunity to be heard.

See—

Grannis v. *Ordean*, 234 U. S. 385 (1914);

Morgan v. *United States of America*, 298 U. S. 468 (1936).

Also, *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 (1928). At page 33 the Court stated:

"* * * The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant *in the light of all the circumstances*, in view of the importance of the crossing, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future *and other considerations similarly relevant.*

'An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from (p. 34) those here, *be regarded as so unreasonable* as to make the order a violation of the company's constitutional rights and to be in the nature of a confiscation. The protection of the 14th Amendment in such cases is real and not to be lightly regarded. *But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.'* (Citing many cases, including *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499; and *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18." (Italics supplied.)

See also—

St. Joseph Stock Yard Co. v. *United States*, 298 U. S. 38;

Ohio Bell Telephone Co. v. *P. U. Commission*, 301 U. S. 304.

Also, in *Nashville, Chattanooga and St. L. Ry.* v. *Walters, etc.*, 294 U. S. 405, 416 (1935), the Court stated:

> "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass *was arbitrary and unreasonable*, the Supreme Court (of Tennessee), obviously erred in refusing to consider them." (Italics supplied.)

Again, in *Southern Railway* v. *Virginia, etc.*, 290 U. S. 190 (1933), at page 198, the Court held:

> "This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right *to a hearing and review by some court.*" (Italics supplied.)

And, at page 199, the Court, finding that such judicial hearing had not been accorded, reversed the judgment of the state Court.

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 (1912), the Court declared:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, *is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Italics supplied.)

The judgment in the instant case appears all the more in conflict with the Federal decision on the requirements of

"due process of law" when we note that the State and Federal Rules for "Summary Judgment" are practically identical.[4]

Also note that the decisions of the State of New Jersey seemingly follow the Federal decisions previously cited herein on the necessity for a proper review and hearing. Thus, in *Lakewood Express Service* v. *Board of Public U. Commissioners,* 1 N. J. 45 (1948), the Court, at page 52, stated:

> "But the federal and state constitutions fix the limit of the exercise of such powers * * * and guarantee to all the equal protection of the laws.
>
> "When the legislature acts directly its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within the limitations. The power of

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[4] *Summary Judgments—*

The Federal Rule 56 (c)—"Motion and Proceedings Thereon" reads:

"The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

State Rule 3:56-3 "Motion and Proceedings Thereon" reads:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than 2 days prior to the date of hearing. The judgment or order sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter or law. A summary judgment or order, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

a Court to review, in the situation here presented, was clearly stated by Chief Justice Hughes in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, page 52; 80 L. Ed. 1033; 56 S. Ct. 720 (1936)."

See also *Handlon* v. *Belleville*, 4 N. J. 99 (1950), where at page 105, the Court held:

" * * * The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1228 (1936); * * *."

VII. Manner in Which Federal Question Was Raised

The federal question was raised at the outset and urged throughout the proceedings in New Jersey. The amended Complaint contains the following averments:

" * * * 15. The said Act, as amended, is unconstitutional because of its operative effect upon the particular state of facts narrated above and the wrongful course being purchased by the Turnpike Authority, all of which constitute a palpable abuse of power in violation of plaintiff's rights under Art. I par. 1 and Art. IV Sec. VII par. 11 of the 1947 New Jersey State Constitution and the 14th Amendment of the United States Constitution. The said Act, because of its operative effect as hereinabove set forth, is unconstitutional by reason of the directions of Paragraph 11, Section 7 of Articles IV, in view of the prior delegation to the municipality of these powers in this field.

16. The New Jersey Turnpike Act, P. L. 1948 Ch. 454, as amended and supplemented by P. L. 1949, CC 40 and 41; P. L. 1950, Ch. 2; R. S. 27:12-1 et seq., is unconstitutional because no provision is made therein for a hearing in relation to any of the acts of the

said Authority, and grants no opportunity for a review in any Court. Consequently, the municipality, its citizens and other interested parties, are affected by the acts of the Turnpike Authority without due process of law, contrary to the State and Federal Constitutional provisions before cited.

17. The described action of the New Jersey Turnpike Authority, premised on the statute—R. S. 27:23-1 et seq.—and the amendments and supplements thereto, is a detour around the processes of our constitutionally guaranteed form of government, and an unreasonable and arbitrary deprivation of the rights of the citizens of Newark to the property, development and opportunity which is theirs in the 'Port Newark' area, contrary to the provisions of the Constitutions of New Jersey and of the United States."

This pleading was not further amended. The summary judgment was entered on this complaint by the lower Court which in its opinion found that the Act and the method of operation was constitutional.

Practically all of the Federal and State cases cited under VI were cited in Appellant's Brief filed in the Supreme Court of New Jersey, and of course the Appendix to Appellant's Brief included in full the Amended Complaint. The question of violation of the Federal Constitution was never abandoned.

VIII. Cases Sustaining the Jurisdiction

The cases which are believed to sustain the jurisdiction are, among others, the cases hereinbefore cited on pages 10 and 11; *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 (1942); *Miller* v. *Schoene, Va.*, 276 U. S. 272 (1928); *Northern Pac. Ry. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39 (1925); *Tregea* v. *Modesto Irrigation Dist., Cal.*, 164 U. S. 179 (1896); *Near* v. *State of Minnesota* (1931), 283 U. S. 697.

Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, United States Code, section 1257 (2).

Dated: September 17, 1951.

CHARLES HANDLER,
Attorney for Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1950.

No. A141.

THE CITY OF NEWARK, *Plaintiff-Appellant,*

vs.

NEW JERSEY TURNPIKE AUTHORITY, CONSTRUCTION AGGREGATES CORPORATION, and PETER KIEWIT & SONS CO., *Defendants-Respondents.*

Argued May 28, 1951; decided

On appeal from the Chancery Division of the Superior Court.

Mr. Charles Handler argued the cause for the appellant (Messrs. George B. Astley and Algernon T. Sweeney on the brief)

Mr. Ward J. Herbert argued the cause for the respondents.

The opinion of the court was delivered by

VANDERBILT, *C.J.:*

This is an appeal by the City of Newark from a summary judgment of the Chancery Division of the Superior Court granted on the motion of the defendants. The appeal was taken to the Appellate Division of the Superior Court and while there pending was certified here on our own motion.

The New Jersey Turnpike Authority was created by the New Jersey Turnpike Authority Act of 1948 (L. 1948, c. 454, as amended, L. 1950, c. 1) for the purpose of financing, constructing and operating a modern express highway traversing the state from the George Washington Bridge in the north to the Delaware Memorial Bridge in the south. The route determined upon by the Authority for the turnpike runs south through the easterly section of the City of Newark from Point No Point on the Passaic River to

Bound Creek on the Essex-Union County line, with interchanges at Raymond Boulevard and Port Street approximately two miles apart. The Authority's plans call for the construction of approximately 7100 feet of the turnpike in the Newark area from Roanoke Avenue to the Lehigh Valley Railroad on a base of earth varying in height from 5 to 67 feet, with bridges provided across certain streets and railroads. In August, 1950, the contract for the grading of the Newark portion of the turnpike was awarded to Construction Aggregates Corporation and Peter Kiewit & Sons Co.

The City instituted this action to enjoin the performance of the grading contract, to prevent the construction of this portion of the turnpike in the manner contemplated, to have the Turnpike Authority Act declared unconstitutional, and to obtain temporary restraint pending final determination of the action. In support of its contention that the Authority palpably abused its power in settling upon the present mode of construction, the City alleged that the Raymond Boulevard interchange is unnecessary and requires an excessive taking of potentially valuable land and that building upon a base of earth, rather than erecting a steel or reinforced concrete structure with an open base is wasteful of land and, in addition, is neither practical nor standard construction, and interferes unduly with existing and paper streets and with the City's master plan for future industrial development. The City's attack upon the constitutionality of the Turnpike Authority Act was premised upon the assertion that section 5 (j) of the act vesting powers of eminent domain in the Authority and sections 7 and 8 of the act dealing with the method of issuing bonds by the Authority constitute an illegal delegation of legislative power for want of appropriate standards. The City also averred in its complaint that the consent of its Board of Commissioners is mandatory under section 14 of the act before the Authority can take public lands now devoted to the public use and that the plenary powers of the City under the Home Rule Act (R.S. 40:67-1 *et seq.*) to regulate and control its streets have not been extinguished or impaired by the Turnpike Authority Act.

After answering the complaint, the Authority and its co-defendants moved for summary judgment on the pleadings pursuant to Rule 3:56 and lengthy affidavits and exhibits were duly submitted by the parties. The trial court granted the defendants' motion, holding that "no genuine factual issue on the subject of palpable abuse of authority" in the determination of the mode of construction was presented, and that there was no merit to the City's contentions that the Turnpike Authority Act was unconstitutional or that the Authority's actions were otherwise invalid. It is from this judgment that the City appealed.

As its principal point the City contends that the pleadings, affidavits and exhibits raised a genuine issue of fact on which trial should have been had and that the court below erred in entering summary judgment on the defendants' motion. With this contention we do not agree. The Turnpike Authority is an independent public corporation especially created by the Legislature to carry out legitimate and important functions of government. It is a body both corporate and politic analogous in many respects to a municipal corporation, *New Jersey Turnpike Authority v. Parsons*, 3 N. J. 235 (Sup. Ct. 1949). Like a municipal corporation it is vested with and enjoys a considerable degree of discretion as to the manner in which it carries out its functions. So long as such a corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion, 2 *McQuillan, Municipal Corporations* (3rd ed. 1949) §§ 10.33-10.37 and the numerous cases there cited. Therefore, since in the instant case it is unquestioned and, indeed, unquestionable that the Turnpike Authority was acting within the scope of its statutory powers in determining upon the location and mode of construction of the turnpike, the court below quite properly concluded that the question on the motion for summary judgment was whether the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made that the Authority in adopting its plans was guilty of a palpable abuse of discretion. The City objects to the use of the term "palpable

abuse of discretion" and asserts that the true issue is whether the Authority unreasonably or arbitrarily exercised its discretion. This objection is of no significance, however, for the terms are substantially synonymous as is indicated in *Dubin v. Wich*, 120 N. J. L. 469, 471 (Sup. Ct. 1938). It is there stated that "it is the settled rule that the exercise of a discretionary authority will not be disturbed unless palpably abused, *i.e.*, the action taken is arbitrary or capricious." The test applied by the court below in determining the legality of the action of the Authority was that laid down in *Mayor, etc., Elizabeth v. N. J. Turnpike Authority*, 7 N. J. Super. 540, 545-546 (App. Div. 1950), upon the authority of *Mowry v. Department of Public Works*, 177 N. E. 753 (Ill. 1931), and *Boyden v. Department of Public Works*, 182 N. E. 379 (Ill. 1932). In both these cases the Illinois Supreme Court stated:

> "To justify a court in holding unjust, unreasonable, or oppressive the act of the department of public works and buildings in designating the route for the construction of a hard surfaced road under the provisions of the first or second Road Bond Act, it must clearly appear from the evidence that there has been an abuse of discretion and an oppressive exercise of power in the location of the road. It is not enough that there should be a difference of opinion between the court and the officers of the department. The questions of the location of the road and the manner of its construction are committed to the judgment of the department, and that judgment must be conclusive unless the evidence clearly satisfies the court that the department's action has been oppressive and without reasonable grounds. If there is room for reasonable difference of opinion, the department's action is conclusive."

In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co. v. State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway con-

struction is absolute. Such a holding would give to the Authority a freedom even greater than that of its creator, for the Legislature itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold v. Harper*, 6 N. J. 182 (Sup. Ct. 1951).

Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment.

The City next contends that section 5 (j) of the act vesting powers of eminent domain in the Authority is void as an unconstitutional delegation of legislative power. The basis for this contention is that when the Turnpike Authority Act was amended in 1950 (L. 1950, c. 1) following the decision of this court in *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 253 (Sup. Ct. 1949), section 5 (j) of the act was changed to provide that the Authority could acquire by the exercise of the power of eminent domain any land "which it may determine is reasonably necessary" for its projects. The addition of the quoted words, the City contends, empowers the Authority to condemn not only property which is reasonably necessary for its purposes but also such property which in its opinion is, or which it may determine to be reasonably necessary whether or not it is in fact or in law reasonably necessary, and

therefore renders this section of the act unconstitutional under the holding in *Abelson's Inc. v. New Jersey Board of Optometrists*, 5 N. J. 413 (Sup. Ct. 1950). This is not a condemnation case, however, and it does not appear that the Authority is exercising its power to acquire any lands of the City by way of eminent domain. Nevertheless, because the plans of the Authority call for the taking of streets owned by the City, since it appears that the consent of the City to such a taking is not likely to be forthcoming, and the question has been fully briefed and argued, we will pass on it to prevent useless future litigation.

In the *Abelson* case, *supra*, we were dealing with an act which permitted a professional licensing board to revoke licenses for "any conduct which, in the opinion of the board, is of a character likely to deceive or defraud the public," R.S. 45:12-11 (o). We there held that the standard of conduct imposed was vague and indefinite and not sufficiently explicit to inform those of the profession affected as to the conduct which would render them liable to the penalties that the board was authorized to impose. Such is not the instant case. As pointed out by the court below, the act here in question contains numerous standards as detailed as could reasonably be incorporated therein if the Authority is to function effectively. The words "which it may determine is reasonably necessary" are not objectionable when used to designate the amount of land which the Authority may acquire for the purpose of carrying out its projects. Such words as this, indicating a delegation of discretionary power, are frequently to be found in statutes where it is impossible or impractical for the Legislature to prescribe in advance, for example, the amount of property, the quantity of materials, or the number of employees which are to be required to carry out the statutory design. It is interesting to note that R.S. 40:60-2 granting the power of eminent domain to every municipality provides that each may acquire by condemnation such property as "its governing body shall decide to be necessary or useful for the proper exercise of any power conferred upon the municipality by this or any other law." The words of the Turnpike Authority Act, to which the City here objects, invest the Authority with a power that is

primarily administrative and not legislative in nature. The exercise of this power is restrained by the declared policy and spirit of the act and the criteria and standards therein laid down.

The cases and the authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location, and the time of taking are within the discretion of the body endowed by the legislature with the right of eminent domain. The rule is well stated in 1 *Nichols, Eminent Domain* (3rd ed. 1950) 383:

> "The legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work; in such case it makes little, if any, difference whether the grant of authority is, in terms, limited to such land as is 'necessary' for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is for the condemnor and not for the courts to decide, and the decision of such condemnor is final as long as it acts reasonably and in good faith."

In the case of *City of Philadelphia v. Ward*, 34 Atl. 458, 459, (Pa. 1896), the statutory language was quite similar to that objected to in the instant act. The Pennsylvania Supreme Court there stated:

> "In the present case it must be borne in mind that the power to determine what land was necessary for the site of the bridge was expressly conferred by the act of 1870 upon the commissioners who were authorized to erect the bridge. They 'may take actual possession of any land or property at or near South Street which they may deem necessary for the site of the bridge.' It follows that they alone were empowered to determine how much land was necessary, and, when their decision was made, it was final as to that subject. Nothing but an abuse of this power could suffice to overthrow their action."

For other cases of similar import see *Ryan v. Housing Authority of Newark*, 125 N. J. L. 336, 340-341 (Sup. Ct.

1940); *Rindge Co. v. Los Angeles County*, 282 U. S. 700 (1923); *United States v. Dugger*, 89 F. Supp. 877 (D.C. E.D. Tenn., 1948); *Housing Authority v. Riggenbotham*, 143 S. W. 2d 79 (Tex. 1940); *Spahn v. Stewart*, 103 S. W. 2d 651 (Ky. 1937); *Lynch v. Forbee*, 37 N. E. 437 (Mass. 1894). The validity of the Authority's exercise of its right of eminent domain can obviously only be determined from case to case on the facts presented in an actual condemnation proceeding.

The City further asserts that under section 14 of the act the Authority cannot take public lands now devoted by the City to the public use without the consent of its Board of Commissioners and that the plenary powers of the City under the Home Rule Act (R.S. 40:67-1 *et seq.*) to regulate and control its streets have not been extinguished or impaired by the Turnpike Authority Act. These assertions are so devoid of merit as to approach the specious and may be summarily dealt with. First, these assertions are utterly incompatible with the right of eminent domain granted the Authority by section 5 (j) of the act, which specifically provides that the Authority may acquire by eminent domain any lands and other property "including public lands, parks, play grounds, reservations, highways or parkways, owned by or in which any county, city borough, town, township, village, or other political subdivision of the State of New Jersey has any right, title or interest, or parts thereof or rights therein—." A clearer specification of the extent of the Authority's power to condemn the City's property would be difficult to draft. Second, the idea that any and every municipality along the route of the proposed turnpike could effectively veto either its location or the manner of its construction by a withholding of consent is in direct conflict with the very concept of a turnpike designed to serve the best interests of the entire state and not merely those of particular localities. Third, section 14 of the act is obviously not intended to be a limitation upon the Authority's power of eminent domain, but rather to make clear that the Authority and municipalities have the power to arrange privately for the transfer of municipal lands to the Authority "without the necessity for any advertisement, order of court or other action or

formality, other than the regular and formal action of the authorities concerned." Fourth, section 21 of the act expressly provides that "all other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this Act." The Legislature has broad and well established powers over municipalities, *Slothers v. Martini*, 6 N. J. 560 (Sup. Ct. 1951), and its ability to provide for the superiority of the Authority over the City in the respects here involved is therefore beyond question.

Finally, the constitutional question raised by the City as to the validity of the method provided in section 7 and 8 of the act for the issuance of bonds by the Authority is patently beyond the scope of this proceeding and we therefore express no opinion thereon. The parties necessary for a determination of this question are not before the court and it does not appear that the City has any interest therein or is injured thereby.

The judgment appealed from is affirmed.